IN THE

Supreme Court of the United States

October Term, 1963

No. 96

YVETTE M. WRIGHT, HORACIO L. QUINONES, DARWIN BOLDEN, BENNY CARTAGENA, RAMON DIAZ, JOSEPH R. ERAZO, BLORNEVA SELBY, WALSH McDERMOTT, SETH DUBIN, all individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

against

NELSON A. ROCKEFELLER, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, CAROLINE K. SIMON, Secretary of State of the State of New York, and DENIS J. MAHON, JAMES M. POWER, JOHN R. CREWS and THOMAS MALLEE, Commissioners of Elections constituting the Board of Elections of the City of New York,

Defendants-Appellees,

and

ADAM CLAYTON POWELL, J. RAYMOND JONES, LLOYD E. DICKENS, HULAN E. JACK, MARK SOUTHALL and ANTONIO MENDEZ,

Defendants-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-INTERVENORS-APPELLEES

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Statement

This civil action was brought under the Civil Rights Act, 42 U. S. C., Sections 1983, 1988, 28 U. S. C., 1343, to redress an alleged deprivation of plaintiffs' Federal constitutional rights purportedly arising under the 14th and 15th Amendments of the Constitution of the United States.

The complaint is directed against what appellants conceive to be a "distinct and separate portion of Chapter 980 of the 1961 laws of New York State" (par. 5 complaint) (R. 3). The particular paragraphs of said statute which are challenged describe the boundaries of the 4 Congressional districts in the County of New York, which Congressional districts are known as the 17th, 18th, 19th and 20th Congressional districts of the State of New York. The complaint alleges that that portion of the aforesaid Chapter 980 which creates the boundary of the 17th through 20th districts of New York establishes irrational, discriminatory and unequal Congressional districts in the County of New York and segregates eligible voters by race and place of origin (R. 3).

The complaint seeks, *inter alia*, the following relief:

(a) A declaratory judgment declaring that the portion of the aforesaid Chapter 980 which describes the boundaries of the 17th through 20th Congressional districts is violative of the 14th and 15th Amendments to the Constitution of the United States (R. 7);

(b) That a preliminary injunction and permanent injunction be entered restraining the defendants from conducting the primary and general elections scheduled for September 6, 1962 and November 6, 1962 respectively, in New York County on the basis of the Congressional district boundaries in said County as described in Chapter 980 (R. 7);

(c) That the Court decree that, unless there is enacted into law a valid redistricting of the Congressional districts a reasonable time prior to September 6, 1962, that the primary and general elections in the said districts be held at large in the County of New York;

(d) That the Court decree that, unless there is enacted into law a reasonable time prior to September 6, 1962 a

valid redistricting of the Congressional districts in question, that a special master be appointed to constitutionally redefine the boundaries of those districts (R. 8).

The Issues

Assuming, arguendo, only that appellants stated a cause of action in the trial below, a perusal of the complaint demonstrates that the success of their action was inextricably linked, *inter alia*, to their ability to prove the following:

> (1) That the boundary lines created by Chapter 980 were • • • irrational, discriminatory and unequal; "and
>
> (2) "Segregates eligible voters by race and place of origin" (Par. 7 of complaint) (R. 6).

The main thrust of the appellants' case as construed in light of the evidence adduced at the trial was directed toward having declared unconstitutional that portion of Chapter 980 (which plaintiffs have erroneously assumed to be severable) establishing the 17th through 20th Congressional districts because such lines involve segregation based on racial lines. Little, if any, of the evidence adduced by plaintiffs at the trial was directed toward showing disparity in the voting power of persons in the various Congressional districts involved.

Small wonder—because, had the appellants attempted to stress only the disparity theory without having it linked to a purported racial question they would obviously have run squarely into the holdings in *Wood* v. *Broom*, 287 U. S. 1, 53 S. Ct. 1, and *Colgrove* v. *Green*, 328 U. S. 549, 66 S. Ct. 1198. The slight disparity involved would, it is submitted, have presented, on the face of the complaint, no basis for relief as well as a serious question as to the justiciability of the matter.

Discussion of disparity, if any, of the voting power will then be limited in this brief in light of the above and in reliance on the rationale of the Statutory Court in the case of *WMCA* v. *Simon*, 370 U. S. 190.

We thus choose to squarely face the main factual question as to whether appellants have shown that the redrafting of the lines forming the Congressional districts in question was done along racial lines so as to segregate the appellants (or some of them—in that two of the appellants live within the 17th Congressional district), out of the 17th (R. 187-194) Congressional district and to unconstitutionally dilute their voting power solely because of their race or place of origin.

Although it is the position of the intervenors that this case could have been decided on its facts, *i.e.*, that there had been no racial gerrymandering in the Congressional districts in question, the intervenors do not concede any of the other Constitutional questions which necessarily arise from the allegations of the complaint (as distinguished from those facts actually demonstrated at the trial).

The appellants called only two witnesses, Mr. Domingo Clemente and Mr. Edward Limoges. The testimony of these two witnesses taken together primarily shows the following:

1. That the Island of Manhattan is divided into four Congressional districts with populations in each of the districts running from a low of 382,320 (17th district) to a high of 445,175 (19th district) (R. 40-44). Such evidence shows a disparity, we believe, of no more than 14.2% and not 15.4%, as alleged in Paragraph 8 of the complaint (R. 6-7).

2. That the lines which establish the 17th Congressional district are drawn so as to show:

(a) In one instance (98th Street and Park Avenue) a census tract which has less than 10% Puerto Rican and non-white population, was cut so as to leave approximately 45% of said non-white population without the district and 55% within the district (R. 52). Most of the blocks of said census tract are included within the 17th Congressional district (R. 53). Such was the case in the old 17th Congressional district (see Exhibits 2A-2C, 4B) (R. 195, 199, 202);

(b) In one instance (Park Avenue, 91st Street to 98th Street) a census tract having a population of 17% Puerto Rican and non-white was cut and that included within the said 17th district was only four blocks of a fourteen block census tract which only contained 13.3% of the population of said tract (*i.e.*, 3,056 persons of 10,377 persons living in the entire census tract) and that of this 13.3%, 455 persons were non-white (R. 64-65);

(c) That an area in the northeast corner of the 17th district (north of 88th Street and east of 3rd Avenue) containing 10,507 persons of which less than 5% were Puerto Rican and non-white (*i.e.*, the district was at least 95% white) was not included within the new 17th Congressional district (R. 65) (R. 69);

(d) That in the southeast corner of the 17th Congressional district an area known as Stuyvesant Town and which contained less than 5% Puerto Rican and non-white was added to the 17th Congressional district, excepting that a strip of this area (at least 95% white) along 1st Avenue between 14th and 19th Streets was excluded (R. 69) (see Exhibits 2A-2C, 4B);

(e) That an area adjacent to Stuyvesant Town (bounded by 14th Street, 1st Avenue, 19th Street

and 3rd Avenue) which contained a population of only 12.2% Puerto Rican and non-white was not taken into the district. This area contained 6,862 persons of which only 837 were Puerto Rican and non-white (R. 99);

(f) That a triangular shaped area bounded by 4th Avenue, 14th Street and Third Avenue, containing a population having between 35% and 50% Puerto Rican and non-white was allowed to remain within the new 17th district (Exhibits 2A-2C, 4B);

(g) That a census tract running from East 4th Street to East Houston Street was cut by the Congressional line running along Great Jones Street so as to have a population derived from said tract consisting of 8.2% of Puerto Rican and non-whites within the 17th district and 12.6% without the 17th. The bulk of the land mass of the tract is outside the 17th. Such was the case with respect to the old 17th (R. 69);

(h) That the southerly border of the 17th Congressional district cuts through an area (from West Broadway to Bank Street), which is less than 5% Puerto Rican and non-whites. The area immediately to the south of the said southerly border line of the 17th Congressional district is comparatively large and contains less than 5% Puerto Rican and non-white and could have been added to the 17th Congressional district (R. 69), Exhibits 2A-2C, 4B;

(i) That the westerly border of the new 17th Congressional district is the same as theretofore existing and it cuts through various census tracts having Puerto Rican and non-white populations ranging from less than 5% to 50-75% (R. 70). In the tract in which there is a Puerto Rican and non-white population of 50-75% (West 26th to West 30th

Streets), the census tract is cut so as to allow a partial tract with a population of 71.2% inside the 17th and the balance of the tract with 48.7% outside the 17th. In absolute numbers, however, more Puerto Rican and non-whites are in the portion of the tract outside the 17th Congressional district (R. 70).

Other census tracts are cut with various percentages and absolute numbers of Puerto Rican and non-white persons inside and outside the 17th Congressional district.

3. That there are numerous ways in which more Puerto Rican and non-white persons could have been added to the district (R. 99-100) (Exhibits 2A-2C, 4B).

4. That there are also numerous ways in which more white persons could have been added to the district without materially increasing the number of Puerto Rican and non-white persons in the district (R. 100).

No evidence was submitted on the number of persons: (a) who were registered to vote and, (b) who actually voted within the census tracts in the 17th or in the districts or tracts nearby, although suggestions to this effect were made by Mr. Justice Moore during the course of the trial (R. 44-45).

Nor was evidence introduced concerning the manner (*i.e.*, Democratic, Republican, Liberal, etc.) in which various census tracts or election districts voted in previous elections. Nor was any evidence adduced showing the economic structure, or the type of buildings or communities (business, residential, manufacturing, etc.), included within the 17th Congressional district. But, rather plaintiffs proceeded without any evidence on such matters with polarized view that the enlargements of the Congressional districts must have been accomplished solely on a racial basis.

That none of the foregoing probabilities which may have shown a rational basis (although perhaps a purely political one), on which the legislature may have acted with reference to enlarging the lines of the Congressional districts in question, was excluded by the evidence of the appellants. That the appellants were required by their evidence to exclude such reasonable possibilities is set forth in *Lindsley* v. *National Carbonic Gas Co.*, 220 U. S. 61, 78, 79, 31 S. Ct. 337, 340 (1911). The appellants approach disregards the conclusive presumption that a legislature acts with full knowledge and in good faith, *U. S.* v. *Des Moines Nav. & Ry. Company*, 142 U. S. 510, 544, 12 S. Ct. 308, 317 (1892).

Summary of Argument

The striking down of a State statute is a most serious matter under any circumstances and, it is submitted, should be particularly avoided when no challenge of a State statute has been made for a long period of years. In the instant matter the 17th Congressional district as now defined by Chapter 980 with respect to almost all of its borders, has been substantially the same for a period of ten years. Chapter 980 merely added certain areas in the southeasterly section of the 17th Congressional district which were immediately contiguous with the former 17th Congressional district and also certain areas in the northeast portion of the district which were immediately contiguous with the former easterly and northeasterly boundary of the former 17th Congressional district. During the many years that the 17th Congressional district has been defined as it basically is now, no one attacked or challenged the constitutionality of said district on any grounds. The addition of the new areas to the former 17th Congressional district was not shown on the trial by any stretch of the evidence or of the imagination, to deprive any person or group of persons of their vote—for any reason whatsoever—much less because of their race or color.

If the appellants had viewed Chapter 980 in its entirety, instead of from the narrow polarized view they choose to take, they would have found that as compared to other Congressional districts in the State the 17th to 20th Congressional districts stand about in the median with respect to the voting power of the individuals living within the districts. The choice of the appellants in choosing, and limiting their case, to only the four Congressional districts on the Island of Manhattan fails to recognize that Chapter 980 is an integrated body of law setting up 41 Congressional districts—one interdependent upon the other. There is no severability clause in said chapter—and one cannot say that it was the intention of the legislature to make districts which could be microscopically examined on their own—without reference to the entire body of New York State Congressional districts.

The appellants have also failed to realize that there must be dividing lines somewhere if we are to have Congressmen elected on a district basis as distinguished from a statewide basis. That these lines were drawn in some instances through census tracts which contain Puerto Rican and non-white persons in varying percentages, cannot be made to spell out a singling out of any race or group of persons so as to either disenfranchise such persons or to dilute their vote.

The mathematical permutations and combinations possible from the factors of—the size of cut census tract portions included in or out of the 17th, absolute numbers and percentages of Puerto Rican and non-white persons included in or out of the 17th, and the race makeup of various census tract districts contiguous with but excluded from the 17th—are infinite so that the appellants, defendants, intervenors, the Court or anyone else can mold them into demonstrating anything one should desire and could be made to give a certain degree of comfort to all persons who should desire to utilize such an Alice-in-Wonderland tech-

nique. Those inclined to such a purely mathematical and intriguing approach would find their task geometrically increased by adding the variable factors produced by the voting strength of the population of the 37 districts comprising the balance of New York's 41 Congressional districts.

Throughout the entire trial below appellants failed to recognize that the great bulk of persons excluded from the 17th district and living on the Island of Manhattan (if we are to limit our argument only to the Island of Manhattan) are white rather than Puerto Rican and non-white. If any vote has been diluted it has applied as much to white persons as to Puerto Rican and non-white. Thus it is obvious that there has been no singling out of any race or group of persons for a dilution of vote—but if there is a dilution of vote in the Manhattan Congressional districts other than the 17th, such dilution equally affects all persons, white and non-white alike, living without said 17th district.

That a small disparity in the size and voting power of any Congressional district (and again we run into the problem of the failure of the appellants to compare the four Manhattan districts with the voting power of the other 37 districts within New York State), would, it is submitted, be a question particularly for the legislatures of the United States and the State of New York and would not be the type of political question with which the Court should exercise its equitable powers. Cf. *Wood* v. *Broom*, 287 U. S. 1, 53 S. Ct. 1 and *Colgrove* v. *Green*, 328 U. S. 549, 66 S. Ct. 1198.

It would appear that the racial allegations made in the complaint were made with a view towards taking the factual situation here out of the ambit of the *Broom* and *Colgrove* cases, *supra*, and placing them in the entirely different background and factual pattern of the unique

situation existing in *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960). That the factual pattern of *Gomillion* v. *Lightfoot* is so unlike the factual case presented here will be discussed hereinafter—and, of course, may readily be seen from the reports of the case. (See also Lucas, *Dragon in the Thicket: A Perusal of Gomillion* v. *Lightfoot*, S. Ct. Rev. 194 (1961).)

The appellants' attempt at demonstrating that there are less Negroes on an absolute basis as well as on a percentage basis in the 17th Congressional district than in the other three Manhattan districts, does not make out a violation of the Constitution. And this, if for no other reason that the failure of appellants to recognize that the Constitution prohibits segregation but it does not require that the legislature take action to mathematically adjust all existing racial imbalance and to affirmatively integrate Congressional districts.

It is pointed out also that except for the complete disfranchisement of the Negroes in *Gomillion*, as well as their being cut off from all of the general functions and the service functions of that municipality, all of the cases relied on by the apellants deal with the deliberate segregation of persons from the use of facilities such as schools, swimming pools, buses, etc. Such cases do not involve the problem of the readjustment of Congressional district lines so as to include persons into one Congressional district and to cut them out of another where they are now enjoying the identical franchise with respect to voting. Moreover, it must be taken to be appellants' position that such readjustment must necessarily be done on a racial basis—that is, either the Legislature or the Court (according to the appellants) must single out Puerto Rican and non-white persons and move them into the 17th Congressional district—and sever their existing voting affiliations.

ARGUMENT

POINT I

The appellants failed to adduce evidence showing that they (or persons similarly situated) have either been deprived of their vote, or have had their voting power materially diluted solely because of their race or place of origin.

The appellants on the trial of this action attempted to remove their case from the general ambit of the political arena and placed into the sphere created and habitated only by *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960) because of *Gomillion's* unique factual pattern.

In their haste to wedge the facts of this case into the exceptional situation existing in the *Gomillion* case, appellants deliberately or otherwise failed to adduce evidence on the disparity of voting powers between the four Congressional districts in issue and New York's other 37 districts. They likewise have failed to show what the racial composition of the other 37 districts were, whether the Negroes living in those districts have diluted votes or enhanced votes with respect to the four Congressional districts in Manhattan.

The Supreme Court in *Lindsley* v. *National Carbonic Gas Co.*, 220 U. S. 61, 78, 79, 31 S. Ct. 337, 340 (1911) stated certain basic propositions which are equally applicable to the instant case:

> "The rules by which this contention must be tested, as is shown by repeated decisions of this court are these: (1) The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify * * * but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is

> purely arbitrary. (2) A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. (3) When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. (4) One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

The appellants in attacking the constitutionality of the Congressional district lines as drawn failed to show that such lines do not rest upon a rational basis other than race or color. In particular, the appellants failed to exclude the possibility that the lines were drawn on a historical basis, a political basis (*i.e.*, Democrat and Republican voting records), an economic basis or on other possible reasonable bases which cause the division of other Congressional districts.

The appellants' reliance upon *Gomillion* v. *Lightfoot*, *supra*, is, we will show, misplaced and particularly, the appellants have failed to heed the admonition found in *Gomillion* v. *Lightfoot* (at p. 344) to the effect that:

> "Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretative process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them must not be applied out of context in disregard of variant controlling facts."

Gomillion:

(1) *Gomillion* was one of the battles in the racial conflict for political control of Macon County and the City of Tuskegee was redistricted for no other reason than to exclude Negroes from the city. See *Lucas, supra*. There

was not in *Gomillion* any Federal compulsion to create new district lines so as to reduce the number of Congressional districts, as in the instant case, from six to four.

(2) Of the 1,000 voters (600 white, and 400 Negro) within the City of Tuskegee prior to its redistricting, it was alleged that only four or five of its Negro voters remained afterwards—not one single white voter or resident was removed by the redistricting (p. 341).

(3) The redistricting in *Gomillion* not only wholly and completely disenfranchised the Negro voters from their theretofore right to vote in the City of Tuskegee but even as importantly such redistricting would have deprived the Negroes from the general municipal functions and municipal services which had theretofore been supplied to them by the City of Tuskegee. (*Gomillion* v. *Lightfoot*, *supra*, at p. 347), and (*Lucas*, *supra*, at p. 239 *et seq.*) In the instant case, as distinguished from *Gomillion*, if anyone was hurt by the drafting of the new lines of the 17th Congressional district, at least as many whites as Puerto Rican and non-whites were injured.

There is no constitutional right for any person to be in any particular Congressional district. The voting rights and all other privileges on one side of the Congressional district lines involved here are in the very nature of things basically equal to the rights on the other side of any Congressional district line. Of course, nothing of this nature could be said about *Gomillion* v. *Lightfoot*.

It is also to be noted that the motives existing in the fencing out of the Negroes from Tuskegee, Alabama, do not and could not exist here. The fencing out of a Negro from Tuskegee, Alabama, would have, in the circumstances of the racial situation existing in that city, resulted in a complete deprivation of the Negro from all the services, pleasures and facilities the City of Tuskegee offered. This cannot and does not exist on the Island of Manhattan. It

could make no difference to the citizens of the four Congressional districts involved where a theoretical line is drawn with respect to their Congressional district. Persons on both sides of the line have exactly co-equal rights to all the facilities, services and pleasures that may exist in any of the other Congressional districts. Although, motive is not always of great relevance, it does in certain situations spell out and lend color and light to a factual pattern. Any possible motive to exclude Negroes and Puerto Ricans from any Congressional district solely because of their race or color, would not exist in Manhattan's Congressional district picture because the use or non-use of facilities is not and could not be involved, as it was in the *Gomillion* case. Thus, by an absolute removal of improper motive an inference can be drawn that the unconstitutional act complained of did not take place.

Therefore, on the basis of the factual situation, it is urged that this Court affirm the judgment of the Court below.

POINT II

The facts here, having no similarity to those in *Gomillion* v. *Lightfoot, supra,* the Court below was correct in refusing to exercise equity powers because there is neither such a clear case of segregation or invidious discrimination as would warrant the Court in entering this particular political thicket.

Historically—and nothing contained in *Baker* v. *Carr,* 82 S. Ct. 691 alters the same—the Courts have refused to exercise their equity powers in matters which do not involve clear cases of violations of Constitutional rights. *South* v. *Peters,* 339 U. S. 276, 70 S. Ct. 641 and cases therein cited.

The Court should consider, as did Mr. Justice Rutledge in his concurring opinion in *Colgrove* v. *Green, supra,* the

untimeliness from a pragmatic point of view of the commencement of this lawsuit.

At the time this action was commenced primary elections were scheduled for September 6, 1962—the general election was scheduled for November 6, 1962. The complaint was dated July 25, 1962 and presumably was served on the same day or soon thereafter. The first hearing on the matter was held on August 9, 1962—just four weeks before the date set for the primary election. The relief requested would have the Court reject the judgment and discretion of the State Legislature and substitute judicial conjecture as to new racially balanced Congressional districts.

It is to be noted also, that a striking down of the district lines in question would have required Congressmen to run at large in New York State and not just on a county-wide basis (2 U. S. C. A. 2a(c)(4)). Appellants at this late date have attempted to open a Pandora's box which would require a complete overhauling of the State's electoral process. *Cf.* Mr. Justice Douglas' dissenting opinion in *South* v. *Peters, supra.*

At the very best, the facts upon which the alleged unconstitutionality exists are not clear and we submit that no objective person could find that there was in existence such heavy, invidious and great discrimination so that if the Court did not step in, great constitutional deprivations would remain uncorrected. At the very best (and we believe the facts do not so show) this case is in the penumbra of a racial situation—but much more clearly so, it is a political thicket—and one which, under the circumstances here presented, it is submitted, should be left untouched by the Court.

If the facts here show anything they demonstrate only a racial imbalance, created over the years by unbalanced population shifts into the various areas of Manhattan by persons of white, Puerto Rican and others and non-white persons.

There is nothing in any of the constitutional provisions or cases cited by the appellants which shows that a mere racial imbalance of Congressional districts is *ipso facto* violative of the Constitution of the United States. There is nothing inherently unequal about Congressional districts. *Cf. Brown* v. *Board of Education of Topeka*, 347 U. S. 483, 74 S. Ct. 686. The Constitution, we submit, prohibits segregation but does not necessarily require affirmative action with respect to racially integrating Congressional districts.

The facts, even when interpreted in a light most favorable to appellants show no significant racial discrepancies and at the very most, there is only a *de minimus* disparity in voting power between the districts.

There can be no question but that the facts of this case did not show such a magnitude and frequency of constitutional aberration as would have warranted the Court in exercising its equitable powers.

The relief prayed for would require a direction which might bring even greater disparity of voting right than that complained of and which might deprive all citizens, possibly on a state-wide basis, of representation by districts which the prevailing policy of Congress commands. (2 U. S. C. A. Sec. 2a(c), *cf. Colgrove* v. *Green, supra.*

POINT III

The factual situation presented raises no questions under the 14th or 15th Amendments of the Constitution of the United States.

Because of the views taken in Points I and II above, it is the position of the intervenors that neither the question of equal protection under the 14th Amendment or the question of abridgement of voting rights on account of race or color under the 15th Amendment, is factually raised here.

CONCLUSION

Wherefore, for reasons herein above stated, the judgment below should be affirmed.

Respectfully submitted,

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